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87-359

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 28, 1987

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QUESTION PRESENTED

When it has been held that a plaintiff's action is frivolous, and a defendant is entitled to a reasonable attorney's fee, pursuant to 42 U.S.C. §1988 and Fed. R. Civ. P. 11, and there is no showing that the plaintiff or his attorney would be unduly burdened by a full fee award, should a court compute the fee by using the "lodestar" method that is used when fees are awarded to prevailing plaintiffs, or, as the majority below held, may the court disregard the lodestar and award an arbitray amount which has no relation to the actual cost of representation?

PARTIES

The parties in this case, when it commenced, were as follows:

1. Eastway Construction Corp., plaintiff.

2. George Jaffee, plaintiff.

3. Irving H. Kanarek, plaintiff.

4. Roger Jacobs, plaintiff.

5. The City of New York, defendant.

6. Nathan Leventhal, individually and as Deputy Mayor of the City of New York, defendant.

7. Anthony G. Gliedman, individually and as Commissioner of the New York City Department of Housing Preservation and Development, defendant.

8. Charles Reiss, individually and as Deputy Commissioner of the New York City Office of Development, defendant.

9. The Community Preservation Corporation, defendant.

10. Michael Lappin, individually and as President of the Community Preservation Corporation, defendant.

11. John Does one through fifty, defendants.

12. Chemical Bank N.A., defendant.

The petitioners are parties 5 through 7, defendants below.

The respondents are parties 1 through 4, plaintiffs below. In addition, LaRossa Mitchell & Ross, plaintiffs' attorneys, are also respondents because the United States Court of Appeals for the Second Circuit held that plaintiffs' attorneys should pay half of the $10,000 in attorneys' fees which petitioners should receive. If a writ of certiorari is issued, petitioners will argue before this Court that the total amount of

fees they should receive is in excess of $50,000. Since petitioners do not challenge the allocation of the fee award set by the Second Circuit, the plaintiffs' attorneys now have a direct interest in this case. To distinguish them from the other respondents, the law firm of LaRossa, Mitchell & Ross will be referred to herein as "respondent law firm." The word "respondents" will be used to refer to the other respondents and the phrase "all respondents" will be used to refer to all respondents including the respondent law firm.

Parties 9 and 10, defendants below, did not cross-appeal from the District Court's denial of their motion for attorney's fees, and thus ceased to have an interest in this case on May 21, 1985, when the United States Court of Appeals for the Second Circuit affirmed the dismissal of the case

against all parties. Defendants 11 and 12 did not appear in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, the City of New York, Nathan Leventhal, Anthony G. Gliedman, and Charles Reiss, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on June 8, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals dated June 8, 1987 is reported at 821 F.2d 121 (2d Cir. 1987). A copy is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Eastern District of New York dated May 23, 1986 is reported at 637 F. Supp 558 (E.D.N.Y. 1986). A copy is reprinted in the Appendix at page 28. The opinion of the Court of Appeals dated May 21, 1985 is reported at 762 F.2d 243 (2d Cir. 1985). A copy is reprinted in the Appendix at page 144. The amended judgment of the United States District Court for the Eastern District of New York is reprinted in the Appendix at page 190. The oral opinion of the United States District Court for the Eastern District of New York, stated on the record in open court, dated August 7, 1984, is reprinted in the Appendix at page 192.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered June 8, 1987. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

STATUTES

42 U.S.C. § 1988 provides:

> ... In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Fed. R. Civ. P. 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount

> of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

(1)

Stockholders and officers of Eastway Construction Corporation had been principals in limited partnerships that participated in the New York City Municipal Loan Program. Between 1966 and 1974, the City loaned the partnerships almost 12 million dollars to enable them to rehabilitate 34 buildings in depressed areas. (A148-149)[1]. These were largely non-recourse loans secured by mortgages on the buildings. By 1981, the

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[1] References preceded by "A" are references to the Appendix to this Petition. References preceded by "CA" are references to the joint appendix filed in the Court of Appeals during the second appeal of this case which resulted in the most recent Court of Appeals decision.

loans were almost 8 million dollars in arrears and by 1983, all but 3 of the 34 buildings had reverted to City ownership. Furthermore, one of the plaintiffs, George Jaffee, Eastway's president, admitted to making illegal payments to a City official to expedite certain loans. (A149-A150).

Subsequently, the City decided that it would not enter into contracts with firms whose principals had controlled entities that had defaulted on City loans, and that the City would not approve such firms as contractors on private projects where City approval of contractors was required. (A150-A151). Since Eastway had specialized in working on publicly-financed housing rehabilitation projects in New York City, these policies significantly curtailed Eastway's business. (A151). Eastway challenged these policies in a state proceeding and lost. Eastway Construction

Corp. v. Gliedman, 86 A.D.2d 575, 446 N.Y.S.2d 306 (1st Dept. 1982), appeal withdrawn or discontinued, 58 N.Y.2d 972, no other citation (1983). (A151-A154).

(2)

Eastway again challenged the City's policy against it by commencing an action in federal court on February 3, 1984. Respondents sued the City, several City officials, the Community Preservation Corporation ("CPC"), CPC's president, Chemical Bank, and fifty unidentified "John Does". (A157). CPC is a nonprofit corporation which was founded by 39 banks for the purpose of lending money to private parties in order to enable them to rehabilitate residential buildings in depressed areas. In 1979 and again in 1981, CPC denied loans for the rehabilitation of a building in which George Jaffee, Eastway's

president, had an indirect interest. (A154-A156).

Respondents' complaint alleged that the City's policy of not doing business with Eastway or its principals violated their constitutional rights and that the City, CPC, and the other defendants had engaged in a conspiracy in violation of the Sherman Antitrust Act to drive Eastway out of the construction business. (A158). Petitioners and CPC moved for summary judgment dismissing the action. Petitioners admitted that the City had adopted a policy against dealing with Eastway, but denied that the City had induced others to refrain from dealing with Eastway. Petitioners also denied that the City's policy deprived Eastway of any property right or any other right protected by federal statute or the United States Constitution. CPC denied that it had engaged in a conspiracy with the

City; it asserted that its denials of the loans described above were based on the facts surrounding the projects in question and that it had no policy against lending money to projects connected with Eastway or its principals. (A159-A161). Petitioners and CPC requested attorney's fees on the grounds that respondents' action was frivolous. The District Court granted the motions to dismiss. The Court said that respondents had shown neither a civil rights nor an antitrust violation. The Court declined to grant the defendants' requests for attorney's fees, finding that the action was not frivolous. (A161-A162, A190-A198).

(3)

Respondents appealed the dismissal of their action and petitioners cross-appealed the denial of their motion for attorney's fees. CPC did not cross-appeal.

The Court of Appeals, after ruling that the District Court had properly dismissed respondents' civil rights and antitrust claims (A162-A175), addressed the attorney's fee issue raised by petitioners' cross-appeal.

The Court held that petitioners were entitled to attorney's fees from respondents under 42 U.S.C. § 1988 for the defense of the civil rights claim. The Court found that respondents' civil rights claim was unreasonable and groundless because respondents were unable to point to the deprivation of any right conferred by the United States Constitution or by federal statute. The Court said that Eastway's unsuccessful challenge to the City's policy in state court should have put respondents on notice that the City might receive attorney's fees if the City's policy was challenged again. (A177-A180).

The Court then held that the City was also entitled to attorney's fees under Fed. R. Civ. P. 11 for the defense of the antitrust claim. The Court said that Rule 11, as amended, required an attorney to conduct a reasonable inquiry into the validity of a complaint before signing it and it also required the imposition of sanctions where it appears that a complaint has been filed in bad faith, to harass a defendant, or where "after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." (A181-A187).

The Court said that although it could not say for certain that respondents or respondent law firm had acted in subjective bad faith in suing petitioners, nevertheless,

the antitrust action was doomed to failure because the City and CPC did not compete with Eastway and Eastway did not allege any anti-competitive effects. The Court also said that "a competent attorney, after reasonable inquiry, would have had to reach the same conclusion." Therefore, the Court held that the District Court erred in denying petitioners' motion for attorney's fees incurred in defending against the antitrust claim. The Court of Appeals remanded the case back to the District Court to determine the amount of attorney's fees that the City should receive and to determine whether the fees should be paid by respondents or respondent law firm or both. (A187-A189).

(4)

The proceedings on remand commenced with a conference before the District Court on June 27, 1985. (CA1e, CA3-CA8e). The

District Court stated that the Circuit Court's decision required it to assess full fees on both claims and it stated that it only had discretion to determine whether to assess fees against respondents or respondent law firm. (CA5-CA7). The District Court directed petitioners to submit their fee application. (CA8d-CA8e).

On July 25, 1985, petitioners filed a motion for attorney's fees in which they sought a "lodestar" amount of $43,925, from all respondents, jointly and severally. (CAle, CA9-CA104). The lodestar amount was arrived at by multiplying the number of hours each of three attorneys worked on the case by a reasonable market-based hourly rate for that attorney.

On October 16, 1986, respondents opposed petitioners' motion. (CA105-CA136). Respondents argued that the lodestar should be based on cost-based

hourly rates composed of salary and allocable overhead rather than market-based rates and also challenged as excessive and duplicative the number of hours requested by appellants. (CA107-CA110, CA119-CA136, CA327, CA328).

On October 17, 1985, the District Court requested briefs on, whether, in order to apportion the fee award, the court should conduct an inquiry into the nature of respondent law firm's preparation and beliefs; and what due process and attorney-client privilege questions would be raised by such an inquiry. (CA140-CA141). Both petitioners and respondents submitted responses to these inquiries.

In a letter dated January 7, 1986, petitioners responded to an inquiry of the District Court regarding whether it could award fees for legal work done in connection with the appeal before the Circuit Court and

in litigation of the fee award. (CA356-CA360). Petitioners included an updated fee request of $58,550. (CA360). Respondents opposed the awarding of fees for the appeal and litigation of the fee and they also argued that the District Court had discretion to award a fee below the lodestar. (CA361-CA365).

At oral argument on January 15, 1986, petitioners argued that, under existing case law, it would be improper for the Court to reduce the fee from the lodestar amount. (CA335-CA336). Respondent law firm represented to the Court that its clients, due to financial hardship, wished to pay any sanctions over two years. (CA345). Although the Court invited the submission of an affidavit demonstrating such hardship, none was submitted to the Court. (CA345, CA449).

The District Court issued a Memorandum and Order on May 23, 1986, awarding petitioners an attorney's fee of only $1,000.00. (A142). The District Court held that petitioners had demonstrated that they were entitled to a "lodestar" amount of $52,912.50 based on a reasonable hourly rate and a reasonable number of well-documented hours. (A108-A109). The Court arrived at this sum after excluding the time spent on the appeal and including the time spent litigating the amount of the fee. (A107-A108).

The District Court reduced the fee to $1,000.00 from the lodestar amount because of a number of factors. The Court said that it was reducing the amount because the action was only "marginally frivolous" (A111-A137), there was no evidence of subjective bad faith (A110), neither respondents nor their counsel had a history

of bringing frivolous cases (A136-A137), there was no evidence that the petitioners' attorneys were "unduly burdened" by the action (A138), and actions against the City involving commercial transactions should not be discouraged (A138-A140).

The District Court held that only respondents, and not respondent law firm should be liable for payment of the fee. The District Court said that it was doing so because the Circuit Court directed it to award attorney's fees against only the respondents for their civil rights claim under 42 U.S.C. § 1988 and to award fees against the respondents and/or respondent law firm for the antitrust claim under Rule 11; and that it would be difficult to determine how much time petitioners' attorneys spent on each claim. (A140-A142).

(5)

Petitioners appealed from the District Court's Memorandum and Order of May 23, 1986. On appeal, petitioners argued that the District Court erred in not assessing fees against respondent law firm, in not awarding fees for time spent on the prior appeal, and in reducing the fee below the lodestar. Petitioners argued that the award should not have been reduced below the lodestar because there was no evidence to show that awarding the lodestar amount would cause respondents or respondent law firm serious financial hardship, nor was there evidence to show that respondents or respondent law firm acted in such a manner as to demonstrate good faith when they commenced the action.

The Circuit Court decided the appeal on June 8, 1987. The majority of the Court held that the District Court erred insofar as

it reduced the lodestar amount below $10,000.00 and insofar as it did not assess fees against respondent law firm. The majority modified the District Court order to the extent of awarding petitioners' $10,000.00 and directing that $5,000.00 should be paid by respondents jointly and severally and $5,000 should be paid by respondent law firm. (A15-A16). The majority held that, when a defendant is entitled to an attorney's fee under 42 U.S.C. § 1988 or Fed. R. Civ. P. 11, the court awarding the fee need not use the lodestar method (which is used for determining the fee to be awarded to a prevailing plaintiff under 42 U.S.C. § 1988), but may exercise its discretion to award a fee which is a fraction of the lodestar. (A6-A10). The majority also said that while a district court has broad discretion in determining the size of the fee to be

awarded, the District Court in this case erred insofar as it awarded a fee of less than $10,000.00. (A10-A12). However, the majority did not articulate the nature of the District Court's error. Thus, the majority said:

> In this case, Chief Judge Weinstein has thoughtfully considered a variety of factors bearing on the appropriate amount of a fee to be awarded as a sanction. Without necessarily endorsing the pertinence of each factor, we agree with his general conclusion that a fee substantially less than the lodestar amount is permissible. However, discharging our responsibilities to monitor the outer limits of discretion in such matters, we have concluded that the bottom of the range of discretion appropriate to this case is a fee of $10,000. We therefore conclude that the $1,000 awarded by the District Judge must be revised upwards to the lowest point of permissible discretion.

(A11-A12).

As to who was to pay the fee, the majority said that, in its earlier decision, the Circuit Court had held that respondent

law firm was liable for fees under Fed. R. Civ. P. 11 for both the antitrust and civil rights claims. (A13). To expedite matters, the majority allocated liability for the fee award, rather than remanding the case to the District Court for that purpose, and ordered that half of the fee should be paid by respondents and half should be paid by respondent law firm. (A13-A15).

The dissent stated that the petitioners should have received the full lodestar amount of $52,912.50 unless it could be shown, on further remand, that the respondents or respondent law firm were financially unable to pay the full amount. (A25-A26).

The dissent said that absent proof of an inability to pay, or other, unusual circumstances, an attorney's fee awarded to a defendant under 42 U.S.C. § 1988 or Fed. R. Civ. P. 11 should be computed by using the same method that is used when a fee is

awarded to a prevailing plaintiff under 42 U.S.C. § 1988, i.e., the lodestar method. (A18-A19). The dissent said:

> The phrase "a reasonable attorney's fee" in rule 11 should be interpreted in the same manner as the same phrase in section 1988. While it is true that the policy underlying section 1988 is to encourage meritorious civil rights litigation, and that rule 11 was designed to discourage improper litigation in general, this difference in goals does not suggest that "a reasonable attorney's fee" should be calculated differently under the two provisions. Both provisions allow an attorney's fee as an enforcement tool for attaining their respective goals, and both provisions seek to shift to the party or attorney whose conduct imposed the financial burden the cost of an attorney's fee that, ideally, would never have been incurred. This fee-shifting tool, which is described in the two provisions in identical language, should not be disparately defined simply because the rules it promotes serve different policies. If the lodestar is the appropriate presumptive measure of "a reasonable attorney's fee" for section 1988, there is no reason it should not be in the rule 11 context as well. Moreover,

> because in the context of this case the attorney's fee is being awarded to prevailing defendants rather that prevailing plaintiffs, section 1988 and rule 11 here serve the same goal - the deterring of improper litigation.

(A23-A24).

REASONS FOR GRANTING THE WRIT

A majority of a panel of the United States Circuit Court for the Second Circuit held that, when a defendant is entitled to "a reasonable attorney's fee" under 42 U.S.C. § 1988 or Fed. R. Civ. P. 11, a District Court can award a fee which is a fraction of the lodestar fee even if there is no evidence that paying the lodestar amount would impose severe hardship on the payor of the fee. The majority held that, even after it has been determined that a party is entitled to a reasonable attorney's fee, the identity of the party is relevant when the fee is computed, and defendants, unlike plaintiffs, are not

entitled to full compensatory fees even if the plaintiff and his attorney can afford to pay full fees. The majority failed to explain why defendants should be subject to radically different treatment when reasonable attorney's fees are computed under 42 U.S.C. § 1988 and Fed. R. Civ. P. 11, and there is nothing in the legislative history or rulings of this Court which would support the notion that a different standard should be employed in determining the amount of attorney's fees that defendants are entitled to receive. Furthermore, the majority appears to be the only circuit court that has explicitly endorsed a double standard for computing fees, depending on the identity of the recipient. The holding of the majority below is directly contrary to recent decisions of the Fourth Circuit, the Seventh Circuit, and the Second Circuit itself, all of which have said that, when an action is frivolous

and a defendant is entitled to an attorney's fee, and the plaintiff can afford to pay, the congressional goal of deterring frivolous actions requires that a full fee be awarded. Furthermore, the majority's opinion is contrary to the general principle that a recipient of an attorney's fee award should ordinarily receive the lodestar amount, which principle has been stated and applied by this Court in several recent cases. Finally, the opinion of the majority creates confusion and uncertainty, and invites extensive satellite litigation over what constitutes a reasonable attorney's fee.

1. The decision of the majority is in direct conflict with decisions of two other Circuit Courts and a prior decision of the Second Circuit.

The District Court found that the lodestar amount of $52,912.50 reflected the value of the work done by petitioners' attorneys on

this case and this figure reflected a reasonable hourly rate multiplied by a reasonable number of well-documented hours. Nonetheless, the District Court awarded petitioners an attorney's fee of only $1,000.00. On appeal, the majority of the Circuit Court stated the District Court abused its discretion insofar as it awarded petitioners less than $10,000.00. In doing so the majority stated that a court can award a defendant who is entitled to an attorney's fee, a fee which is a fraction of the lodestar and the majority did not explain why a fractional award was appropriate here.

Insofar as the Circuit Court held that a defendant who is entitled to an attorney's fee is not entitled to a full fee absent evidence that the plaintiff is unable to pay a full fee award, or some other compelling reason, such holding is directly contrary to

the law as it has been stated by three Circuit Courts, including the Second Circuit.

In Munson v. Friske, 754 F.2d 683 (7th Cir. 1985), the Seventh Circuit upheld an attorney's fee award of $42,095 under 42 U.S.C. § 1988, imposed against a former public employee who had brought a frivolous action alleging several civil rights claims in which he alleged that his employment was wrongfully terminated. The Court held that the fee was appropriate because the plaintiff had the financial ability to pay the fee. Id. at 697-698. In so holding, the Court said: "When a court determines that a plaintiff can afford to pay the award, the congressional goal of discouraging frivolous litigation demands that full fees be levied." Id. at 697.

In Arnold v. Burger King Corp., 719 F.2d 63 (4th Cir. 1983), cert. denied, 469 U.S. 826 (1983), the plaintiff had brought a

frivolous action against his former employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., alleging that his employment had been terminated because of his race. At trial, the District Court dismissed the action after the defendants presented their evidence. The District Court found that the action was frivolous and awarded the defendants a total of $10,744.00 in attorney's fees pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). Id. at 64. On appeal the Fourth Circuit affirmed the fee award. The Circuit Court said that the District Court did not abuse its discretion in awarding defendants full attorney's fees because:

> The trial court found that Arnold was gainfully employed and apparently able to pay the fee award on such reasonable terms as might be arranged, and that the fee award was the reasonable value of the attorneys' services.

Id. at 69. In the course of reaching its conclusion, the Fourth Circuit said:

> When the plaintiff can afford to pay, however, the congressional goal of discouraging frivolous suits weighs heavily in favor of levying the full fees.

Id. at 68 (citation omitted).

In Faraci v. Hickey - Freeman Co., 607 F.2d 1025 (2d Cir. 1979), the plaintiff had brought a frivolous action against his former employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., alleging that his former employer had terminated him because of his national origin. Id. at 1027. The District Court dismissed the action, held that it was frivolous, and held that the defendants were entitled to attorney's fees under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). The defendants claimed that the reasonable value of their lawyers' services was $11,500.00,

but they requested $2,500.00 in light of the plaintiff's limited resources and the District Court awarded them this amount. Id.

On appeal, the Second Circuit said, "Where the plaintiff can afford to pay, of course, the congressional goal of discouraging frivolous litigation demands that full fees be levied." Id. at 1028. It then reduced the fee award to $200 because of the plaintiff's near-destitute financial condition and poor health. The plaintiff had proceeded pro se and in forma pauperis, and affidavits showed that his monthly income exceeded his basic monthly living expenses by only $63.00, and that he suffered from a serious heart ailment. Id at 1026, 1027, 1028, 1029.[2]

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[2] Although the majority below cited Faraci for the proposition that it is permissible to award less than the lodestar when a (Footnote Continued)

In this case, there is no evidence that respondents or respondent law firm are unable to pay the full lodestar requested. The District Court invited respondents to present evidence of inability to pay, but no evidence was presented. Therefore, in this case, the Circuit Court's award of only 20% of the lodestar, without explanation[3], is in conflict with its decision in the Faraci case and with the decision of other circuits.

(Footnote Continued)
defendant is entitled to a reasonable attorney's fee, it did not state that a reduced fee was awarded in Faraci because of a factor which is not present here, the plaintiff's reduced financial cicumstances.

[3] While the District Court gave many reasons for awarding petitioners only $1,000, the Circuit Court majority held that the District Court was wrong by a factor of 10. However the majority did not explain in what manner the District Court erred, nor did it explain why $10,000 was preferable to $1,000 or $50,000.

2. The decision of the majority is in conflict with those decisions of this Court which have repeatedly underscored the importance of the lodestar in computing attorney's fees.

The majority awarded petitioners only 20% of the lodestar without explanation. In so doing, the majority implicitly held that the lodestar is of little importance when an attorney's fee is awarded. This holding is inconsistent with the decisions of this Court which have emphasized the importance of the lodestar in awarding an attorney's fee.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), this Court set standards which "are generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party." Id. at 433, n.7. In particular, the court held when a plaintiff is entitled to an attorney's fee under 42 U.S.C. § 1988, the amount of the fee should have some relationship to the extent of the

plaintiff's success, and the plaintiff should generally not receive full attorney's fees if success was only partial. Id. at 435-436, 438-440. In arriving at this holding, the Court mentioned the importance of the "lodestar" as a starting point for calculating a "reasonable attorney's fee." Thus, the Court said:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

Id. at 433.

In Blum v. Stenson, 465 U.S. 886 (1984), this Court held that, when a plaintiff is entitled to an attorney's fee under 42 U.S.C. § 1988, the fee computation should be based on a market-based hourly rate rather than a cost-based hourly rate even if the plaintiff is represented by a

nonprofit legal services organization rather than a private law firm. Id. at 894-896. The Court also held that, in some cases of exceptional success, a fee award above the lodestar figure may be justified, but the upward adjustment of the fee in the case before it was not justified. Id. at 897, 901-902. In the course of its opinion, the Court cited Hensley, supra, several times and reiterated the importance of the lodestar in arriving at "a reasonable attorney's fee." Id. at 897, 899, 900, 901. In particular, the Court noted that the lodestar will normally incorporate several factors relevant to the fee calculation. Thus, the Court said that the novelty and complexity of the case will normally be reflected in the hourly rate and number of hours requested. If a case is extremely novel and complex it will require special expertise, justifying a higher

hourly rate, and many hours of work. Id. at 898-899.

In Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ___ U.S. ____, 106 S. Ct. 3088 (1986), the Court discussed the proper computation of a reasonable attorney's fee to a prevailing plaintiff who was entitled to attorney's fees under Section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d). In the course of its opinion, the Court again emphasized the importance of the lodestar in computing "a reasonable attorney's fee," id. at 3097-3098, and said that the lodestar figure, the product of a reasonable number of hours times a reasonable rate, is presumptively a reasonable attorney's fee, absent extraordinary circumstances, and that the lodestar figure includes most of the relevant factors comprising a reasonable attorney's fee. Id. at 3098.

Although the foregoing cases involved fee awards to plaintiffs, we respectfully submit that, as the dissent below stated, there is no reason to compute a reasonable attorney's fee differently when the fee is being awarded to a defendant. Thus, in Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978), the Second Circuit, determining that the plaintiffs' action was frivolous, and that defendants were entitled to attorney's fees under 42 U.S.C. § 2000e-5(k), remanded the case to the District Court with directions to award a reasonable attorney's fee and employ Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) as a guide for the computation of the fee, although Johnson involved an award of attorney's fees to prevailing plaintiffs. See also, Jones v. Dealers Tractor and Equipment Co., 634 F.2d 180, 182 (5th Cir. 1981); Faraci v. Hickey-Freeman Co., supra, 607 F.2d at

1028; Nash v. Reedel, 86 F.R.D. 16, 18 (E.D. Pa. 1980).

When fees are awarded to plaintiffs, they serve to encourage persons to protect certain rights or certain societal interests and to reimburse the costs of such protection. When awarded to defendants, fees serve to discourage frivolous litigation which clogs the courts, and to compensate those who have been burdened by such litigation. See, In re Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir. 1985), cert. denied sub nom, Rothman v. New York State Dept. of Transp., ___ U.S. ___, 106 S. Ct. 593 (1985); Faraci v. Hickey Freeman Co., supra, 607 F.2d at 1028; Taylor v. Prudential-Bache Securities, Inc., 594 F. Supp. 226, 229 (N.D.N.Y. 1984), aff'd mem., 751 F.2d 371 (2d Cir. 1984); Patterson v. Aiken, 111 F.R.D. 354, 356-357 (N.D. Ga. 1986); Index Fund, Inc. v.

Hagopian, 107 F.R.D. 95, 99 (S.D.N.Y. 1985). Therefore, since the award of fees to defendants serves important purposes, just as the award of fees to plaintiffs does, there is no reason to treat these two kinds of fee awards differently when they are computed. Consequently, the decision of the majority below is in conflict with principles stated and applied by this Court in several recent cases.

3. The decision of the majority will create uncertainty, confusion, and a proliferation of satellite litigation whenever a party is entitled to an award of a "reasonable attorney's fee."

Many statutes permit a court to award a prevailing party a "reasonable attorney's fee." E.g., 7 U.S.C §2565 (Plant Variety Protection Act of 1970); 15 U.S.C. §77k(e) (Securities Exchange Act of 1934); 17 U.S.C. §505 (Copyright Act of 1976); 29 U.S.C. §1132(g)(1) (Employee Retirement

Income Security Act of 1974); 33 U.S.C. §1415(g)(4) (Marine Protection, Research, and Sanctuaries Act of 1972); 42 U.S.C. §1973(l)(e) (Voting Rights Act Amendments of 1973); 42 U.S.C. §1988 (Civil Rights Attorney's Fees Act of 1976); 42 U.S.C. §2000e-5(k) (Civil Rights Act of 1964); 42 U.S.C. §7604(d) (Clean Air Amendments of 1970). In addition, several rules of the Federal Rules of Civil Procedure provide for the imposition of a reasonable attorney fee as a sanction when a particular rule has been violated. E.g., Rule 11, Rule 16(f), Rule 26(g), Rule 37(b)(2)(E).

A court must exercise its discretion carefully before deciding whether a party should be forced to pay its adversary's attorney's fee. In some cases, the result may depend on the identity of the party and the nature of the case. Thus for example in civil right cases, a plaintiff is usually

awarded fees merely for winning the action, even if the defense was well-grounded, while the defendant will be awarded fees only if the action is frivolous. See, Hensley v. Eckerhart, supra, 461 U.S. at 430 & 430, n.2. Where an attorney's fee is sought for a violation of a Federal Rule of Civil Procedure, a court must decide first, whether a violation has occurred and a sanction is therefore required, and second, whether an award of attorney's fees is the proper sanction.

In any context in which a court decides whether to award an attorney's fee, it must necessarily consider a variety of factors and exercise broad discretion. However, we respectfully submit that, as the dissent below stated, once it has been determined that a party is to receive a "reasonable attorney's fee," the scope of discretion is narrowed and the court should award the

lodestar unless such an award would be financially crushing to the other party or other extraordinary circumstances preclude such an award.

As noted above, this Court has already stated that, where a plaintiff is entitled to an award of fees as a prevailing party, the lodestar is presumptively the proper fee. It has also been noted above that three circuit courts have stated that, when a defendant is entitled to attorney's fees as a prevailing party, the defendant should receive full fees when the plaintiff can afford such fees. Nonetheless, the majority below has held that when the recipient of a fee is a prevailing defendant, or any party who receives an award of fees as a sanction under the Federal Rules of Civil Procedure, the amount of the fee is not presumptively the lodestar, or any particular figure. Rather, the majority states, that under such

circumstances, a court must exercise its discretion in some undefined way and may award a figure which is a fraction of the lodestar.

Although there may be valid reasons for having different standards for the award of attorney's fees, depending upon who is to receive them and in what procedural context the fees are to be awarded, there is no valid reason for computing attorney's fees differently after it has been determined that a party is entitled to an award of an attorney's fee. Furthermore, the approach of the majority below is illogical and confusing. As the dissent below points out, an award which bears no relationship to the lodestar is not a "reasonable attorney's fee", it is an arbitrary fine.

If the position of the majority below is followed, there will never be any way for the parties or district court to ascertain with

any degree of the certainty what amount the district court should award after it has decided than an award of a reasonable attorney's fee is appropriate. The award of an attorney's fees will always be an ad hoc determination subject to ad hoc appellate review. This is exemplified by the recent case of Johnson v. NYCTA, ___ F.2d ___, Docket No. 86-7406 (2d Cir. July 9, 1987), in which the Second Circuit, relying on its most recent Eastway decision, remanded a case for the recalculation of an attorney's fee award without giving the District Court any standards for the recalculation.

Theodore Johnson was employed by the New York City Transit Authority ("NYCTA") from February 16, 1971 through August, 1983. During his employment he was a member of the Transport Workers Union, Local 100 ("TWU"). Johnson v. NYCTA, 639 F. Supp. 887 (S.D.N.Y. 1986). Shortly

after being hired, Johnson commenced a series of judicial and administrative proceedings against the NYCTA and the TWU. Id. at 888-890, 894, 896-896. Johnson's litigation culminated in two actions in federal district court. The District Court dismissed these two actions. Id. at 892, 893, 895. The District Court further held that, because Johnson's actions were frivolous, the defendants were entitled to an attorney's fee under 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k) and that sanctions should be imposed against his counsel pursuant to Fed. R. Civ. P. 11. Id. at 896.

After subsequent proceedings, the District Court awarded the NYCTA $250.00 in costs and it awarded the TWU $32.50 in costs and $6900.00 in attorney's fees; and it ordered Johnson and his counsel to each pay half of these amounts. Johnson v. NYCTA,

____ F. Supp. __, Nos. 83 Civ. 1352, 85 Civ. 0629 (E.D.N.Y. August 5, 1986), sl. op. at 8. The District Court disallowed $6,575.00 in fees requested by the NYCTA and $2038.75 in fees requested by the TWU because no contemporaneous time records were available to support these fees. Id., sl. op. at 7-8. Before making its award, the District Court considered and rejected several arguments Johnson made to induce the District Court to award no fee or a reduced fee. Id., sl. op. at 2-7.

On appeal, the Second Circuit reversed and remanded the case for a redetermination of the fee award. Johnson v. NYCTA, ____ F.2d ____, No. 86-7406 (2d Cir. July 9, 1987). The Circuit Court held that a reconsideration of the amount of the fee award against Johnson was required because it was not clear whether the District Court merely assessed Johnson one half of the

lodestar or whether it exercised its discretion as required by the most recent Eastway decision. The Circuit Court decision does not suggest that Johnson presented evidence of difficult financial circumstances. Furthermore the Circuit Court said that "$3,450 is not necessarily an excessive award under the circumstances." Nonetheless, it remanded the case to the District Court for a reconsideration of the award and directed it to consider Johnsons' ability to pay $3,450 as well as other unspecified "mitigating factors."

The Johnson case shows that the most recent Eastway decision will create endless confusion and uncertainty because, under Eastway, it is impossible to estimate what a reasonable attorney's fee will be in any given case until a particular District Court judge exercises his or her discretion and

that exercise of discretion is affirmed by a Circuit Court.

Furthermore, the majority opinion below invites endless satellite litigation, when attorneys fees are awarded. Johnson makes it clear that, under Eastway, a district court must first, examine the merits of a case, and second, decide whether to award an attorney's fee, and then, rather than use the relatively simple and well-established lodestar method, it must engage in a far-reaching analysis in order to properly exercise its discretion before arriving at some figure which may bear no relation to the cost of representation actually incurred by the party receiving the attorney's fee. As result, the compensatory purposes of awarding an attorneys fee will be defeated, and in addition, the benefits of reducing frivolous litigation will be offset by the length and complexity of litigating the

attorney's fee. See, Fed. R. Civ. P. 11, Advisory Committee Notes. Contrary to the admonition of this Court in Hensley v. Eckerhart, supra, 461 U.S. at 438, "[a] request for attorney's fees [will] result in a second major litigation."

In Hensley and its progeny, this Court has provided litigants, their counsel, and the judiciary with a clear and relatively simple method for computing a "reasonable attorney's fee." It is not a very complicated matter to determine the proper hourly rate and number of hours for the calculation of the lodestar; it can usually be done on papers. Then, absent unusual circumstances, simple multiplication will provide the proper fee. However, the majority below, in discarding this well-settled and easy to follow body of law, forces the courts into an uncharted area where the phrase "reasonable attorney's fee," which appears in many

statutes, has no settled meaning, and must be defined anew for each case after a court has taken evidence on and considered a host of unnamed "mitigating factors."

Therefore, the decision of the majority below, if allowed to stand; will create confusion, uncertainty, and excessive satellite litigation whenever attorney's fees are awarded.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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